The Letter of the Law

By Craig E. Countryman

It is a federal crime, under 18 U.S.C. Sections 1341-46, to use the mail or wires to further "any scheme or artifice to defraud," including a scheme "to deprive another of the intangible right of honest services." Read literally, the statute would criminalize calling in sick to work when you really intend to spend the day at the beach, for that deprives your employer of your services that day. Recognizing the potential for such absurd results, the appellate courts have not read the provision literally. Every circuit agrees that not every breach of contract, conflict of interest, breach of fiduciary duty or misstatement violates the statute, but they agree on little else.

There are long-standing splits on what principles separate a criminal deprivation of one's "honest services" from a civil or ethical lapse. The Supreme Court recently refused, over Justice Antonin Scalia's dissent, to hear a case that would have decided which principles were appropriate, the proper scope of each principle, or whether the statute is just unconstitutionally vague. Sorich v. United States, 483 U.S. 350 (1987), which held that the mail fraud statute, as it then existed, only protected traditional property rights, not intangible rights like a right to good government. By codifying the "honest services" doctrine in 18 U.S.C. Section 1346, Congress presumably meant to restore the pre-McNally situation where courts addressed the contours of the doctrine on a case-by-case basis.

Two concerns drove the Supreme Court to hold in McNally that a "scheme to defraud" did not include a scheme to deprive another of "honest services": The then-existing statutory language was ambiguous and the rule of lenity dictates constraining criminal statutes narrowly to avoid sweeping in borderline conduct, and "honest services" cases often involved state and local public officials and there were federalism concerns with having the Justice Department handle them. Although McNally's holding has been abrogated, the two main limiting principles on the "honest services" doctrine that have emerged in the lower courts reflect McNally's concerns.

The first limiting principle, adopted by the 3rd and 5th Circuits but rejected by the 7th, is that the deprivation of "honest services" must entail shirking a duty imposed by state law. For example, United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc) upheld the conviction of an employee of the Texas Workers' Compensation Commission who accepted money from lawyers who appeared in front of the commission in violation of a Texas criminal statute that forbade state officials from accepting such payments.

Incorporating state law has a number of benefits. First, requiring that the duty to act honestly that is the basis of a prosecution already be spelled out in a state statute (or judicial opinion) reduces the risk that "honest services" prosecutions will target conduct a reasonable person wouldn't already know may be criminal. Relatedly, state law provides a fixed universe of duties, which clarifies the breadth of the federal statute.
Using state, as opposed to federal, law to define the scope of the "honest services" statute helps allay federalism concerns when the defendant is a state public official. Federal prosecutors serve as a backstop that assists the state in enforcing its own laws - and perhaps a necessary backstop if the defendant is high-ranking enough (for example, Gov. Rod Blagojevich) to potentially impede state authorities from acting themselves-rather than creating their own ethical code that can be used to target state officials who assert their independence.

The limitation has its problems, though. Brumley itself goes on to say that not every violation of state law will necessarily support a federal mail fraud conviction. And United States v. Murphy, 323 F.3d 102 (3d Cir. 2002) adopted the state law limiting principle, only to reverse the conviction of a political party official who violated a state bribery statute because the statute did not create a fiduciary relationship between the official (who was not a public employee) and the state. If only some provisions of state law create the requisite duty, courts must decide which state laws are sufficient on a case-by-case basis, eliminating the clarity the limitation might otherwise provide. Further, while requiring that some other source of law establish the duty helps ensure adequate notice, this interest is no less served if the "other" source of law is an existing federal statute or doctrine.

Relying on state law also does not completely cure the federalism problem because the punishment for federal "honest services" fraud could differ from the punishment for the underlying state offense. Brumley is a prime example: The maximum penalty under the state statute was one year, while the maximum for federal mail fraud state is five years per count. And if the "honest services" doctrine is to be confined to cases involving violations of state law, why is it necessary at all? True, federal criminal statutes often prescribe conduct already covered by state law - federal laws prohibiting robbery on an FDIC-insured bank are an example. But with nothing in the mail fraud statute to explicitly suggest it must always be tied to a duty arising from state law, it seems dubious to limit it to cases where it is redundant.

The second limitation, adopted by the 7th Circuit but rejected by at least the 3rd, is that the charged conduct must entail misuse of position for private gain. For example, United States v. Bloom, 149 F.3d 649 (7th Cir. 1998), dismissed an "honest services" charge against a Chicago alderman who, in his private life as a lawyer, allegedly advised his clients to illegally avoid their property taxes because the advice was unrelated to his position as an alderman. Although Bloom may have violated an ethical obligation not to represent clients with interests adverse to the city, "honest services" fraud requires an action by the defendant that is connected to his employment; any lawyer in the city could have given such advice.

The first half of the limitation - misuse of position - seems appropriate because it focuses on what "services" the employee owes his employer. If the fraud can be unrelated to the defendant's position, then any criminal act that involves mail or telephone and is committed by someone with a job would constitute "honest services" fraud. Although "misuse of position" is also potentially vague, requiring the "misuse" to be evidenced by a violation of some other law - state or federal - may help. Thinking about the defendant's conduct in these terms may clarify what "other" laws are relevant. For example, the political party official's violation of the underlying state offense.

What constitutes a "private gain" sufficient for criminal liability? That phrase must include more than money or property. Separate parts of 18 U.S.C. Sections 1341 and 1343 prohibit using the mail or wires to deceptively "obtain money or property," so restricting "private gain" to those alternatives would render the "honest services" part of the statute superfluous. But "private gain" cannot include every imaginable benefit, otherwise the employee who calls in sick so he can spend a day at the beach is in trouble. Indeed, United States v. Thompson, 484 F.3d 877 (7th Cir. 2007) explains that certain gains through misuse of office - like a traffic judge who automatically dismisses all speeding tickets so he can leave work early and play tennis-are not actionable. So where is the line?

To add to the confusion, the defendant need not be the one who gains. United States v. Sorich, 523 F.3d 702 (7th Cir. 2008) affirmed the "honest services" convictions of city employees whose civil service hiring decisions were influenced by political patronage, in violation of a federal consent decree. The court held that the private gain obtained by the third parties who received city jobs was enough. But what separates that from the private gain of the speeders who escape traffic fines (also a monetary benefit), which presumably would not support a conviction? Replacing the phrase "honest services" with "misuse of office for private gain" answers some questions but creates many others.

Perhaps the best solution is to deem the statute unconstitutionally vague on its face, an approach endorsed by six judges in United States v. Rybicki, 354 F.3d 123 (2d Cir. 2003) (en banc) (dissenting opinions). Every circuit to consider the question has upheld the statute's constitutionality either because it has a specific intent requirement - the defendant must intend to carry out the fraud - or because the court evaluated vagueness "as applied" to the particular defendant rather than across all the statute's potential applications. But a specific intent element generally saves a potentially vague statute when it requires the defendant to intend something he should know in criminal. Here, the defendant may not know that the "fraud," if it is something like calling in sick to work to go to the beach, is criminal, so the specific intent requirement should not save the statute. And evaluating vagueness "as applied" erroneously allows courts to overlook
problematic cases at the statute's outer boundaries. "As applied" challenges may ultimately prevent over-reaching in particular cases, but not before a defendant has been wrongly arrested, indicted, and perhaps convicted.

Certainly some flexibility is needed. Fraud comes in many varieties and Congress cannot particularly identify every scheme a criminal could concoct. But it may be worth invalidating the current statute for vagueness, thereby forcing Congress to articulate uniform, coherent standards establishing the kinds of schemes, other than those to take money or property, that constitute criminal mail and wire fraud.

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